

Law Office of Jack Silver

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Via Electronic Mail
Judith.Harvey@usdoj.gov

March 22, 2013

Judy Harvey, Attorney
U.S. Department of Justice
Environment and Natural Resource Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

Re: *Northern California River Watch v. City of Santa Clara*
USDC Case No.: 3:10-cv-05974 JSC

Dear Attorney Harvey:

In compliance with 33 U.S.C. § 1365(c)(3), we enclose for review by the Department of Justice a copy of the Settlement Agreement and Mutual Release of Claims entered into by the parties in resolution of the above-captioned matter.

Thank you for your consideration.

Sincerely,

Jerry Bernhaut

JB:lhm

Enclosure

cc: Nicole E. Granquist, Esq. -Via Electronic Mail - ngranquist@downeybrand.com

SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims ("Agreement") is entered into between Northern California River Watch ("NCRW") and the City of Santa Clara ("City") (collectively, the "PARTIES") with respect to the following facts and objectives:

RECITALS

WHEREAS, NCRW is a 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, dedicated to the protection, enhancement, and restoration of the rivers, creeks, and tributaries of Northern California;

WHEREAS, the City, organized under the laws of the State of California, owns and operates a collection system for the purpose of collecting and conveying for treatment wastewater from residential, commercial, and industrial sources;

WHEREAS, on or about July 17, 2012, NCRW provided the City with a Notice of Violation and Intent to File Suit under the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §1365, ("CWA Notice Letter");

WHEREAS, on or about November 19, 2012, NCRW filed a Complaint against the City in the United States District Court, Northern District of California, Case No. 3:12-cv-05974-JSC ("Complaint");

WHEREAS, the City denies any and all of NCRW's allegations and claims in the CWA Notice Letter;

WHEREAS, NCRW and the City, through their authorized representatives and without either adjudication of NCRW's claims or admission by the City of any alleged violation or other wrongdoing, have chosen to resolve in full NCRW's allegations in the CWA Notice Letter and the Complaint through settlement and avoid the cost and uncertainties of further litigation; and

WHEREAS, NCRW and the City have agreed that it is in their mutual interest to enter into this AGREEMENT setting forth the terms and conditions appropriate to resolving NCRW's allegations set forth in the CWA Notice Letter and Complaint.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, NCRW and the City hereby agree as follows:

AGREEMENT

1. Definitions

(a) **Effective Date**: The term "Effective Date," as used in this Agreement, shall mean the last date on which the signature of a party to this Agreement is executed.

(b) **Condition Assessment**: The term "Condition Assessment" shall mean a report that comprises inspection, rating, and evaluation of the existing condition of a sewer collection system.

Inspection is based upon closed circuit television ("CCTV") inspections for gravity mains; manhole inspections for structural defects; and, inspections of pipe connections at the manhole. After CCTV inspection occurs, pipe conditions are assigned a grade based on the Pipeline Assessment and Certification Program ("PACP") rating system, developed by the National Association of Sewer Service Companies. The PACP is a nationally recognized sewer pipeline condition rating system for CCTV inspections.

(c) Full Condition Assessment: The term "Full Condition Assessment" shall mean a Condition Assessment of all gravity sewer lines (not force mains) except for gravity sewer lines located within one hundred-fifty (150) feet of surface waters, defined as a river, creek, stream canal or bay (*i.e.*, those gravity sewer lines not included in the definition of Surface Water Condition Assessment).

(d) Surface Water Condition Assessment: The term "Surface Water Condition Assessment" shall mean a Condition Assessment of all gravity sewer lines (not force mains) within one hundred-fifty (150) feet of surface waters, defined as a river, creek, stream canal or bay.

(e) Significantly Defective: A sewer pipe is considered to be "Significantly Defective" for purposes of this Agreement if the pipe's condition receives a grade of 5 based on the PACP rating system. The PACP assigns grades based on the significance of the defect, extent of damage, percentage of flow capacity restriction, and/or the amount of pipe wall loss due to deterioration. Grades are assigned as follows:

- 5 — Most significant defect
- 4 — Significant defect.
- 3 — Moderate defect
- 2 — Minor to moderate defect
- 1 — Minor defect

2. Sewage Collection System Investigation & Repair

(a) Surface Water Condition Assessment

(i) Within five (5) years of the Effective Date of this Agreement, the City shall complete a Surface Water Condition Assessment, excepting those sewer lines that have been inspected by CVTV within the last five (5) years or constructed within the last ten (10) years.

(ii) The City shall repair or replace all sewer lines rated Significantly Defective (PACP rating grade 5) by the Surface Water Condition Assessment, or take other appropriate action, within three (3) years of the determination that a line is Significantly Defective. The phrase "take other appropriate action" in this circumstance means to divert sewage flow from a Significantly Defective sewer line or abandon the Significantly Defective sewer line in lieu of repair or replacement.

(iii) With respect to sewer lines that receive a PACP rating grade 4 by the Surface Water Condition Assessment, the City will ascertain whether such lines need to be repaired or re-CCTV'd.

(b) Full Condition Assessment

(i) Within eight (8) years of the Effective Date of this Agreement, the City shall complete a Full Condition Assessment, excepting those sewer lines that, at the time the Full Condition Assessment work is being undertaken in a given area, have been inspected by CCTV within the last five (5) years or constructed within the last ten (10) years.

3. Sewer System Overflow Response and Reporting

(a) The City shall modify its sanitary sewer overflow ("SSO") report form to include the method or calculation used for estimating total spill volume, estimating spill volume that reached surface waters, and estimating spill volume recovered.

(b) For Category 1 SSOs,¹ the City shall document the following information, and will include, where feasible, the same information in SSO reports submitted to the State Water Resources Control Board via the CWIQS SSO website:

- (i) Date and time the City was made aware of the SSO, based on information received from a complainant, informant, or through self-discovery (whichever is earlier).
- (ii) Date and arrival time to the scene of the SSO by the crew responsible for containment of the SSO.
- (iii) Estimated ongoing SSO discharge rate in gallons per minute (if ongoing) at the time the crew responsible for SSO containment arrived at the scene of the SSO.
- (iv) SSO stop date and time.
- (v) Description of how SSO start date and time were calculated, including the date and time the complainant or informant first noticed the SSO, unless self-discovered by the City, and any other relevant information, which may include:
 - (1) Any further information provided by the complainant or informant;
 - (2) Corroborated witness statements (e.g., information provided from witnesses, nearby residents or business operators);

¹ For purposes of this Agreement, a Category 1 SSO is a sanitary sewer overflow that equals or exceeds 1,000 gallons, results in a discharge to a drainage channel and/or surface water, or discharges to a storm drainpipe and that was not fully captured and returned to the sanitary sewer system.

- (3) Visual observation by City staff;
- (4) Estimated volume of spill and flow rates. Start date and time can be determined by taking the estimated volume at the time of discovery and dividing it by the estimated flow rate at that same time. The start date and time is then determined by subtracting the duration from the time of discovery. Volume and flow estimations can be based on the following:
 - a. Calculation of the area and depth of the SSO;
 - b. Estimation using CWEA Manhole Overflow Gauge Worksheet;
 - c. Flow meter reading in the collection system or pump stations;
 - d. Pump run times and pump discharge volume ratings;
 - e. Water usage information for customers who discharge into the collection system;
 - f. If the entire spill is captured, the tank level indicator; and/or
 - g. Any other relevant technical or collection system information.

(c) For any SSO that is greater than 50 gallons and reaches surface waters, the City will, if feasible, collect a sample at the point of discharge, and from receiving waters at a point upstream (within 150 feet of the discharge, if possible) and at a point downstream (within 150 feet of the discharge, if possible). The samples will be analyzed for pH, dissolved oxygen, ammonia, and fecal coliform. Feasibility for obtaining a sample will involve whether sufficient flow exists to collect a representative, uncontaminated sample, and whether weather or other conditions allow City staff to safely obtain a sample (*i.e.*, City staff will not be placed at risk for injury in severe weather).

Any requirements under this provision which conflict with sampling or testing requirements by a regulatory agency (*e.g.*, the sampling location, frequency, parameters analyzed, etc.), either currently in effect or adopted in the future, shall cease to be in effect under the agreement between the parties. The absence of sampling or testing requirements by a regulatory agency shall not be considered a conflict with regulatory agency requirements.

The City will agree to investigate the cause of the SSO entering surface waters and will employ the following measures to prevent future overflows: (a) if the SSO is caused by a structural defect, then the City will take immediate action to repair or replace the defect, or take other action necessary to protect water quality (*e.g.*, divert the flow until the repair/replacement can occur); and (b) if the defect is non-structural, such as a grease blockage or vandalism to a manhole cover, the City will implement appropriate measures (*e.g.*, additional maintenance or cleaning), where feasible, to address the cause.

(d) During the first two years of this Agreement, the City shall collect SSO samples for any SSO that is greater than 50 gallons and reaches surface waters, if feasible, for River Watch to

conduct a CAM-17 toxic metals analysis. If no SSO events meeting this criteria occur during the first two years of this Agreement, no further sample collection is required. Feasibility for obtaining a sample will involve whether sufficient flow exists to collect a representative, uncontaminated sample, and whether weather or other conditions allow City staff to safely obtain a sample (*i.e.*, City staff will not be placed at risk for injury in severe weather). If the City alleges that it is not feasible to collect SSO samples for River Watch for any SSO greater than 50 gallons which reaches a surface water, the City shall include an explanation of infeasibility in its SSO Report.

4. **CIWQS Link**

(a) The City shall create a link from the City's website to the State Water Resources Control Board's CIWQS SSO Public Reports' website, and shall publicize this new link to customers and members of the public.

5. **Supplemental Environmental Project – Private Lateral Program**

(a) Within one (1) year from the Effective Date of this Agreement, City staff will recommend to the City Council an ordinance establishing a program for the inspection, repair, and/or replacement of private sewer laterals. The program will use the following events as a basis or "trigger" for inspection, repair and/or replacement:

- (i) If two (2) or more sanitary sewer overflows are caused by the same private sewer lateral within two (2) years;
- (ii) Concurrently with the repair or replacement of the sewer main line to which the lateral is connected where evidence exists of issues related to the connected lateral; or
- (iii) If a problem is identified via CCTV activities or other investigation by City maintenance crews that could reasonably result in an SSO.

6. **NCRW Attorney's Costs and Fees**

Within thirty (30) calendar days after the Effective Date of this Agreement, the City shall pay NCRW the sum of fifty thousand dollars (\$50,000.00) as reimbursement for NCRW's investigative, expert and attorneys' fees and costs. Payment shall be made by the City to NCRW in the form of a single check payable to "Northern California River Watch," and shall constitute full satisfaction and payment for all costs of litigation and attorneys' fees incurred by NCRW that have or could have been claimed in connection with NCRW's allegations in its CWA Notice Letter and the Complaint up to and including the Effective Date of this Agreement, and for NCRW's expert and attorneys' fees and costs spent monitoring and enforcing the City's compliance with ongoing obligations under this Agreement up to and including the Termination Date, with the exception of any action taken to enforce this Agreement in accordance with the dispute resolution procedures set forth in paragraphs 15 and 16 below. Payment shall be mailed to the Law Office of Jack Silver, P.O. Box 5469, Santa Rosa, California 95402 or, if via Federal Express or other overnight service, to Law Office of Jack Silver, 100 E Street, Suite 318, Santa Rosa, California 95404.

TASK CONFIRMATION

7. By April 15 of each year during the life of this Agreement, the City shall provide NCRW with a letter that details the City's progress during the prior calendar year towards completion of tasks described in paragraphs 2 through 5 above. The City shall submit the progress letter to NCRW either electronically or by First Class Mail
8. If the City completes all tasks described in paragraphs 2 through 5 above prior to the Termination Date of the Agreement, the City shall cease providing the progress letter described in paragraph 7 to NCRW.

TERMINATION DATE

9. This Agreement shall terminate eight (8) years from the Effective Date.

NO ADMISSION OR FINDING

10. Neither this Agreement nor any payment pursuant to the Agreement shall constitute evidence or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this Agreement and/or any payment pursuant to the Agreement may constitute evidence in actions seeking compliance with this Agreement.

MUTUAL RELEASE OF LIABILITY, COVENANT NOT TO SUE, AND DISMISSAL

11. In consideration of the above, and except as otherwise provided by this Agreement, the PARTIES hereby forever and fully release each other and their respective successors, assigns, directors, officers, agents, board members, representatives, and employees, and all persons, firms and corporations having an interest in them, from any and all environmental claims and demands of any kind, nature, or description whatsoever, and from any and all liabilities, damages, injuries, actions or causes of action, either at law or in equity, whether known or unknown, which the PARTIES have or may have against each other based upon or connected to NCRW's allegations as set forth in the CWA Notice Letter and Complaint up to and including the Effective Date of this Agreement.
12. The PARTIES acknowledge that they are familiar with section 1542 of the California Civil Code, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The PARTIES hereby waive and relinquish any rights or benefits they may have under California Civil Code section 1542 with respect to any other claims against each other arising from, or related to, the allegations and claims as set forth in the CWA Notice Letter and Complaint up to and including the Effective Date of this Agreement.

13. For the period beginning on the Effective Date and ending on the Termination Date of this Agreement, NCRW agrees that neither NCRW, its officers, executive staff, members of its governing board nor any organization under the control of NCRW, its officers, executive staff, or members of its governing board, will serve any 60-day Notice Letter or file any lawsuit against the City seeking relief for alleged violations of the Clean Water Act or RCRA, or similar state statutes and/or regulations, including the California Porter-Cologne Water Quality Control Act, nor will NCRW support such lawsuits against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions.

14. NCRW shall submit this agreement to the United States Department of Justice and United States Environmental Protection Agency for the 45-day agency review period consistent with 33 U.S.C. § 1365(c) and 40 C.F.R. §135.5. After the United States has either completed its review of this Agreement without objection, or the 45-day agency review period has expired, whichever is earlier, NCRW shall file with the District Court a Notice of Dismissal With Prejudice, providing that NCRW's Complaint and all claims therein shall be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i).

DISPUTE RESOLUTION PROCEDURES

15. Any disputes with respect to any of the provisions of this Agreement shall be resolved through the following procedure. The PARTIES covenant and agree that, if either party believes the other is in violation of one or more terms of the Agreement, the party shall provide notice to the other in writing of what actions or inactions they deem to be in violation of this Agreement. Within thirty (30) days of receipt of such notice, the party receiving the notice shall respond to the notice in writing. If the PARTIES still dispute compliance with this Agreement, within an additional thirty (30) days, the PARTIES will meet and confer in a good faith attempt to resolve their dispute. If the PARTIES cannot informally resolve the dispute, they will enter into binding arbitration, conducted by an arbitrator agreed upon by both PARTIES. Either party may request that the presiding judge of the Santa Clara County Superior Court may select an arbitrator if the PARTIES cannot reach an agreement. The arbitration shall be binding and not subject to ordinary judicial appeal; however, it shall be subject to the procedural provisions provided for under California Code of Civil Procedure sections 1280, *et seq.* The arbitration shall be conducted in accordance with the arbitration rules and procedures of JAMS (Judicial Arbitration and Mediation Service) to the extent other conventional rules are not promptly agreed to by the PARTIES. The relief the arbitrator is empowered to award is limited to injunctive relief to take action specified in this Agreement, and the arbitrator shall be empowered to determine a prevailing party and may award payment of reasonable attorneys' fees and costs to a prevailing party. To the extent there are multiple issues with a different prevailing party, the arbitrator may take those facts into account in terms of an award for fees and costs, and can order each party to bear their own costs.

16. If NCRW asserts that the City is in violation of this Agreement, and the City corrects the action or inaction within sixty (60) days of written notice from NCRW describing the asserted violations, no further enforcement action under the terms of the Agreement shall be taken by either party.

FORCE MAJEURE

17. Separate from, and in addition to, any other limitations on the City's obligations under this Agreement, the City's obligations to comply with any provisions of this Agreement shall be excused or deferred if compliance, or a delay in compliance, is caused by an event or circumstance

beyond the reasonable control of the City or any entity controlled by the City, including its contractors, and which event or circumstance could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Where implementation of the actions set forth in this Agreement, within the deadlines prescribed, becomes unachievable, despite the timely good faith efforts of the City, the City shall notify NCRW in writing within thirty (30) days of the date that the City knew of the event or circumstance precluding compliance, and shall describe the reason for the non-performance. The PARTIES agree to meet and confer in good faith concerning the non-performance and, where the PARTIES concur that the non-performance was or is impossible, despite the timely good faith efforts of one of the PARTIES, compliance shall be excused or new performance deadlines shall be established by agreement of the parties. In the event that the PARTIES cannot timely agree, either party shall have the right to invoke the dispute resolution procedure described herein.

GENERAL PROVISIONS

18. **Construction.** The language in all parts of this Agreement shall be construed according to its plain and ordinary meaning, except as to those terms defined by law, in the Clean Water Act, or specifically herein.

19. **Choice of Law.** This Agreement shall be governed by the laws of the United States, and where applicable, the laws of the State of California.

20. **Severability.** In the event that any provision, section, or sentence of this Agreement is held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

21. **Correspondence.** All notices required herein or any other correspondence pertaining to this Agreement shall be sent by regular, certified, overnight, or electronic mail as follows:

If to NCRW:

Northern California River Watch
290 S. Main Street, Suite 817
Sebastopol, CA 95472
Telephone: (707) 824-4372
Facsimile: (707) 824-4372

And to:

Jerry Bernhaut
c/o Northern California River Watch
Law Office of Jack Silver
PO Box 5469
Santa Rosa, CA 95402-5469
Telephone: (707) 528-8175
Facsimile: (707) 528-8675
j2bernhaut@yahoo.com

If to the City:

Christopher L. de Groot
Director of Water & Sewer Utilities
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2014
Facsimile: (408) 247-0784
cdegroot@santaclaraca.gov

Richard E. Nosky, Jr.
City Attorney
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2230
Facsimile: (408) 249-7846
rnosky@santaclaraca.gov

And to:

Nicole E. Granquist
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: (916) 444-1000
Facsimile: (916) 444-2100
ngranquist@downeybrand.com

Notifications of communications shall be deemed submitted on the date that they are sent by electronic mail, postmarked and sent by first-class mail, or deposited with an overnight mail/delivery service. Any change of address or addresses shall be communicated in the manner described above for giving notices.

22. **Counterparts.** This Agreement may be executed in any number of counterparts, all of which together shall constitute one original document. Telecopy, electronic, and/or facsimile copies of original signature shall be deemed to be originally executed counterparts of this Agreement.

23. **Assignment.** Subject only to the express restrictions contained in this Agreement, all of the rights, duties and obligations contained in this Agreement shall inure to the benefit of and be binding upon the PARTIES, and their successors and assigns.

24. **Modification of the AGREEMENT.** This Agreement, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the PARTIES.

25. **Full Settlement.** This Agreement constitutes a full and final settlement of this matter. It is expressly understood and agreed that the Agreement has been freely and voluntarily entered into by the PARTIES with and upon advice of counsel.

26. **Integration Clause.** This is an integrated Agreement. This Agreement is intended to be a full and complete statement of the terms of the agreement between the PARTIES and expressly supersedes any and all prior oral or written agreements covenants, representations, and warranties (express or implied) concerning the subject matter of this Agreement.

27. **Negotiated Agreement.** The PARTIES have negotiated this Agreement, and agree that it shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Agreement and any uncertainty and ambiguity shall not be interpreted against any one party.

28. **Authority.** The undersigned representatives for NCRW and the City each certify that he or she is fully authorized by the party whom he represents to enter into the terms and conditions of this Agreement.

The PARTIES hereby enter into this Agreement.

Date: 2-19, 2013

NORTHERN CALIFORNIA RIVER WATCH

By: Margaret Fagigalupi
Name: Margaret Fagigalupi
Title: Board President

Date: 3/21/13, 2013

CITY OF SANTA CLARA

ATTEST:

[Signature]
City Clerk

[Signature]
JULIO J. FUENTES
City Manager

APPROVED AS TO FORM:

For NCRW:

Date: 2/18/13, 2013

LAW OFFICE OF JACK SILVER

[Signature]
By: Jerry Bernhaut, Esq.

For the City:

Date: : 3/13, 2013

DOWNEY BRAND LLP

By: Nicole Granquist, Esq.

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